THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2020-001645
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC,
Plaintiff/Counter-Defendant,. ..... Respondent,

v.

Donza H. Mattison,
Defendant/Counterclaimant, ... Appellant.

AND

Donza H. Mattison, in a Derivative Capacity
on Behalf of McMillan Pazdan Smith, LLC,
Third-Party Plaintiff,..... Appellant,

v.

Ronald G. Smith, Joseph M. Pazdan,
Brad B. Smith, and Chad C. Cousins,
Third-Party Defendants,..... Respondents.

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION

This appeal arises from a shareholder derivative action. A derivative action is one "brought by one or more shareholders or members to enforce a right of a corporation." Rule 23(b)(1), SCRCP; Black's Law Dictionary 475 (8th ed. 2004) (derivative action is "a suit asserted by a shareholder on the corporation's behalf against a third party (usually a corporate officer) because of the corporation's failure to take some action against the third party").

Donza H. Mattison, a former employee and member of the architectural firm McMillan Pazdan Smith, LLC ("MPS"), had for many years opposed nearly every business decision made by the otherwise unanimous vote of MPS's members. She parted from the firm in 2017. Her separation was memorialized in a Severance Agreement and General Release, dated December 5, 2017, which was extensively negotiated by her counsel, and which specifically provided for how her 2% ownership of MPS would be valued and paid. All parties agree that the Severance Agreement is valid and enforceable, but when MPS offered to purchase her shares for that amount, she refused, demanding a price nearly four times higher and expressly threatening that, if her demands for payment were not met, she would bring a shareholder derivative suit against MPS's majority members for their purported self-dealing in the administration of the firm.

MPS filed a declaratory judgment action seeking a declaration of rights. MPS asked the court to declare that the Severance Agreement was a valid and enforceable contract and that MPS had properly followed the provisions regarding the valuation of Mattison's shares. Mattison answered and, although her purported pre-suit demand fell short of the requirements of Rule 23, SCRCP, she nevertheless asserted a derivative claim against MPS's majority shareholders. The trial court dismissed her derivative claim, but allowed her to make a new "pre-suit" demand (though litigation was already underway) and to amend and refile the claim.

The trial court subsequently permitted discovery on the threshold question of whether Mattison fairly and adequately represented the interests of the other members. *See* Rule 23(b)(1),

SCRCP ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."). The parties exchanged documents; Mattison deposed six of MPS's minority members; and MPS submitted statements showing *all* of MPS's other members—*i.e.*, the other 98% of the firm—unanimously opposed her derivative claim because her interests diverged from theirs. Accordingly, MPS moved for summary judgment on the derivative claim, arguing Mattison did not represent the other members' interests and had brought the derivative claim for an improper purpose. The court granted the motion in a 16-page Order.[1]

The trial court ruled that Mattison did not fairly and adequately represent the interests of MPS's other members—all of whom expressly said so, and all of whom declined to join or support her claim. The court analyzed their deposition testimony, declarations affirmed under oath, and other evidence showing Mattison's interests diverged from theirs, and concluded MPS had affirmatively shown that Mattison did not fairly and adequately represent them. Mattison *could not* represent the other members of the purported class as the relief she seeks in her derivative claim would divest other members of their ownership shares and would undo numerous decisions taken by the unanimous vote of MPS's other members. The trial court's conclusion was further supported by Mattison's consistent, repeated statements (including in her appellate brief) demonstrating she brought the claim for an improper purpose, namely to gain leverage in her dispute with MPS regarding the value of her membership shares.

In addition, the trial court's Order should be affirmed on two additional sustaining grounds: (1) the inadequacy of Mattison's pre-suit demand, which could not, as a matter of law, be rectified

[1] On February 12, 2021, after this appeal had been filed, the trial court granted MPS summary judgment on its declaratory judgment claim relating to the valuation of Mattison's equity in MPS. The trial court subsequently denied Mattison's Motion to Alter or Amend or for Reconsideration, and, on April 1, 2021, Mattison filed a Notice of Appeal from those Orders. MPS anticipates it will move to consolidate that appeal with this one at the appropriate time.

by a *post*-litigation "pre-suit" demand, and (2) the fact that her Severance Agreement released any claims she might bring against MPS, including claims brought in a representative capacity.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly conclude Mattison did not (and could not) fairly and adequately represent the interests of MPS's other members?

2. Is the Order granting summary judgment on Mattison's derivative claim supported by an additional sustaining ground, namely that Mattison waived and released all claims against MPS, *including any claims in a representative capacity*, when she signed her severance agreement in exchange for valuable consideration?

3. Is the trial court's Order granting summary judgment on Mattison's derivative claim supported by an additional sustaining ground, namely that Mattison did not satisfy Rule 23(b)(1)'s requirement of an adequate pre-suit demand letter?

COUNTER-STATEMENT OF THE CASE AND FACTS

MPS is a regional architectural and interior design firm with offices in South Carolina, North Carolina, and Georgia. *See* Compl. ¶¶ 5–6 (R. 79). Mattison is a former employee and member of MPS, and worked as an architect in MPS's Spartanburg, South Carolina office. *Id.* at ¶ 7 (R. 79). During Mattison's tenure at MPS, she opposed significant business decisions made by the otherwise unanimous vote of MPS's members. *See*, *e.g.*, Am. Answer ¶¶ 14–18, 48 (R. 121–22, 127). Mattison's employment with MPS ended on February 12, 2018. *See* Compl. ¶ 8 (R. 79).

I. Mattison's separation, Severance Agreement, and threat of a derivative claim.

The parties memorialized Mattison's separation with a Severance Agreement and General Release. *See* Compl. ¶ 9 (R. 79); *see also* Severance Agreement (December 5, 2017) (R. 147). The Severance Agreement provided that Mattison's dissociation from MPS would be treated as a "Proper Dissociation," meaning there was no penalty or reduction in the value of her membership shares. *See* Severance Agreement ¶ 2(j) (R. 148). At the time of her separation from MPS, Mattison

owed 2,035 membership units of MPS (approximately 2.2% of the firm), which made her the eighth-largest shareholder in the firm. *See* Mattison's Brief at 10.

When Mattison and MPS signed the Severance Agreement, the annual valuation of MPS had not yet been completed for 2017, and thus the agreement left open the amount that Mattison would be paid for her membership shares. The Severance Agreement, however, provided the method by which Mattison's ownership share of MPS would be valued and paid in accordance with MPS's 2015 Operating Agreement:

> The parties agree that the value of Employee's membership units shall be mutually determined in early 2018 following the close of YR2017, with Company providing access to all current and prior year financial reports, tax returns, and other financial information as requested by Employee's Counsel. The Proper Dissociation will be handled separately from this Agreement and will be done in accordance with the September 30, 2015 Operating Agreement.

Severance Agreement ¶ 2(j) (R. 148). The 2015 Operating Agreement, which Mattison agreed in the Severance Agreement would control her dissociation from MPS, provides that a properly dissociating member will be paid "Fair Market Value" for her membership interest. *See* Operating Agreement §§ 10.2, 11.3 (R. 796, 799–800). "Fair Market Value," in turn, is defined as "the value of the Units as determined by the Management Committee in accordance with the procedure set forth in Section 5.1(s)." *Id*. at Art. I (R. 778). The Operating Agreement further provides that the Management Committee "shall have the power and authority on behalf of the Company to: . . . determine the per unit price of any Membership Interest or Units for purposes of Section 11.3 . . . ." *Id*. at § 5.1(s) (R. 789).

The Operating Agreement further provides that if the parties are unable to agree on a price within 30 days, the value of the membership units will be determined by an appraiser selected by MPS's Management Committee:

> [T]he seller [in this case, Mattison] and the Management Committee shall attempt to agree upon the value of the Units as soon as practical after the occurrence of the event giving rise to a purchase and sale under Article XI. If the seller and the Management Committee are unable to reach an agreement within the first thirty (30) days of the Company's Purchase Period (the 'Agreement Period'), the value of the Units shall be determined as of the end of the fiscal year immediately preceding the date of the underlying event which triggered the sale by a Qualified Appraiser selected by the Management Committee.

Id. at Art. I (R. 778).

In the Severance Agreement, Mattison also released any claims she might have against MPS, including any she might bring in a representative capacity, in exchange for good and valuable consideration she received in the form of severance pay, FMLA leave, Paid Time Off, a 401(k) matching contribution, continued insurance benefits, and a $15,000 bonus. *See* Severance Agreement at ¶¶ 2, 4–5 (R. 147–51). The release states in part:

> **4. General Release of Claims.** Employee hereby releases and forever discharges the Company . . . and its respective managers, officers, directors, employees, agents, legal counsel, and assigns . . . from any and all known and unknown claims of action that Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of her employment from the Company; and (c) any conduct, actions or omissions, known or unknown, by the Released Parties occurring on or before the date Employee executes this Agreement. This release . . . include[s] all benefits, grievances, proceedings, investigations, hearings, charges, complaints, claims, demands, actions, causes of action, and suits of whatever nature, whether known or unknown, fixed, absolute or contingent, matured or unmatured, asserted or unasserted, however arising, and whether legal, equitable or administrative. . . . It is expressly intended, understood, and agreed that the claims released by Employee shall include, by way of example and without limitation, . . . alleged breach of express and implied contract, breach of contract accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and claims under the Operating Agreement or any other operating agreement, any employment agreement,

> handbook or policy relating to her employment or separation of employment;
>
> * * *
>
> Employee represents that she knows of no claim that she has that has not been released by this paragraph. . . . Employee acknowledges and understands that this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other operating agreements, the employment relationship or its termination that occurs up to the date Employee executes this Agreement; provided, however, that nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company.
>
> **5. Covenant Not to Sue**. Employee hereby covenants and agrees not to file, commence or initiate any suit, grievance, demand or cause of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. . . . Employee expressly agrees not to commence or file any class action, including any class arbitration against Company, or serve in any representative capacity in any class action, including class arbitration, against or involving the Company.

Id. at ¶¶ 4–5 (R. 149–51).

In early 2018, MPS retained HDH Advisors LLC ("HDH")—the same outside appraiser it had used in each of the preceding five years—to conduct a 2017 valuation of the firm. *See* Compl. ¶¶ 18–19 (R. 80). When Mattison and MPS were unable to agree on a price for Mattison's membership shares within 30 days after the execution of her Severance Agreement, the management committee elected to use HDH's 2017 valuation as provided in the agreement to determine a per unit price for Mattison's 2,035 membership units, and, pursuant to the terms of the agreement and MPS's 2015 Operating Agreement, offered to purchase her units for this amount. *Id*. at ¶ 20 (R. 80).

Mattison disputed the valuation and demanded a much higher per-unit price. *Id*. at ¶ 21 (R. 80). Specifically, she rejected MPS's offer of $267,647.21 and instead demanded $829,000 for her

units. *See* Letter from Rothstein to Keim at 3 (Jan. 14, 2019) (R. 845–47). She further threatened that if her demands for payment were not met, she would bring a shareholder derivative suit. *Id.* at 3 (R. 847) ("If we are unable to resolve this matter . . . , Ms. Mattison intends to file not only an action for judicial valuation of her shares but also a shareholder derivative action . . . ."). This threat, made in a letter from Mattison's counsel to MPS's counsel, described the alleged self-dealing only in vague, generalized, and conclusory terms, and did not specifically identify the alleged wrongdoers, describe the factual basis of the alleged wrongdoing, identify with particularity the alleged harm to the company, or request any remedial relief. *Id*.

II. MPS's suit regarding the valuation of Mattison's membership shares; Mattison's counterclaims and derivative claim.

Because Mattison refused the offered amount for her shares, MPS filed a Declaratory Judgment Action on February 22, 2019, asking the court to declare that the Severance Agreement is a valid and enforceable contract and that, pursuant to the terms of that agreement, Mattison's membership units are to be valued in accordance with MPS's 2015 Operating Agreement. *See* Compl. (R. 78). MPS further asked the court to declare that MPS properly followed the Operating Agreement's provisions regarding the valuation of the company, and, therefore, the value of Mattison's membership units should be determined by applying the per-unit price from the company's 2017 valuation conducted by its normal outside appraiser in early 2018. *Id*. at ¶ 25 (R. 81). The suit was subsequently assigned to the Business Court before the Honorable R. Lawton McIntosh. *See* Order (March 20, 2019) (R. 4–5).

Mattison filed an Answer, Counterclaims, and Third-Party Complaint on March 4, 2019. *See* Answer (R. 83). She admitted the Severance Agreement was a valid and enforceable contract, *see id*. at ¶ 61 (R. 93), but asserted counterclaims for breach of contract, judicial determination of the fair value of her distributional interest, an accounting and order compelling production of

MPS's financial records, and declaratory judgment, *id.* at ¶¶ 60–91 (R. 93–98). Further, despite having not made a pre-suit demand compliant with Rule 23(b), SCRCP, Mattison made good on her threat and asserted a derivative cause of action against MPS's majority shareholders: Ron Smith, Joseph Pazdan, Brad Smith, and Chad Cousins. *Id*. at ¶¶ 92–110 (R. 99–102). Mattison asserted the majority shareholders had breached their fiduciary duties to MPS by receiving excessive compensation, bonuses, and fringe benefits for themselves and their spouses/family members. *Id*.

MPS and the majority shareholders (the Third-Party Defendants) filed a Motion to Dismiss, arguing Mattison's counterclaims and derivative claim (i) violated the Severance Agreement's covenant not to sue, (ii) had been released by Mattison in the Severance Agreement, (iii) did not comply with Rule 23(b)(1), SCRCP's requirements because Mattison had not made a pre-suit demand or asserted any valid reason for not doing so, and (iv) were impermissible because Mattison did not (and could not) satisfy Rule 23(b)(1)'s requirement that she fairly and adequately represent MPS's other similarly-situated members. *See* Mot. to Dismiss (April 1, 2019) (R. 652).

Judge McIntosh held a hearing on the Motion. *See* Tr. (May 16, 2019) at 11:9 to 25:6 (R. 178 to 192). He agreed that Mattison's derivative suit was flawed, but declined to rule from the bench. *See id*. at 25:8–10 (R. 192) ("I think that the derivative action is probably not going to survive."); *id*. at 55:22–24 (R. 222) ("I'm not ruling, but I'm going to go back and look at it. Quite frankly, my impression is the derivative suit is out.").

The court subsequently issued a Form 4 Order that declined to dismiss Mattison's counterclaims; dismissed her derivative claim (without prejudice); allowed her 30 days to amend her "pre-suit" demand and her derivative claim; and allowed her to conduct discovery on the question of whether she could fairly and adequately represent the class. *See* Order (June 14, 2019)

(R. 6). A few weeks later, the court issued a further written Order containing the same conclusions. *See* Order (July 2, 2019) (R. 10).

III. Mattison's mid-litigation "pre-suit" demand letters, amended derivative claim, and subsequent discovery.

Pursuant to the trial court's ruling, and nearly four months after the suit had commenced, Mattison's counsel sent new "pre-suit" demand letters to MPS's majority shareholders. *See* Letters from Rothstein to Mssrs. Smith, Pazdan, and Smith (June 18, 2019) (R. 160 to 167). Mattison then filed an Amended Answer, Counterclaims, and Third-Party Complaint on July 30, 2019. *See* Am. Answer (R. 119). The pleading reasserted counterclaims for breach of contract, judicial determination of the fair value of her distributional interest, an accounting and order compelling production of MPS's financial records, and declaratory judgment. *Id.* at ¶¶ 60–91 (R. 129–34). And it again asserted a derivative cause of action against the majority shareholders alleging breach of fiduciary duty and breach of the Operating Agreement. *Id*. at ¶¶ 92–124 (R. 135–43).

MPS and the majority shareholders again filed a Motion to Dismiss, arguing Mattison's derivative claim did not satisfy the requirements of Rule 23(b)(1), SCRCP; that Mattison had neither made an adequate *pre*-suit demand nor been excused from doing so; and that Mattison did not fairly and adequately represent MPS's other similarly-situated members. *See* Mot. to Dismiss (Aug. 7, 2019) (R. 664); Mem. in Supp. (Sept. 6, 2019) (R. 666). Mattison filed a memorandum in opposition to the Motion. *See* Mem. in Opp. (Sept. 8, 2019) (R. 679).

Judge McIntosh held a hearing, denied the Motion in a Form 4 Order, and subsequently issued a formal Order stating that the issue of whether Mattison fairly and adequately represents the interests of MPS and the other members should be addressed only after an opportunity for discovery. *See* Tr. (Sept. 10, 2019) (R. 225); Form 4 Order (Oct. 10, 2019) (R. 20); Order (Oct. 30, 2019) (R. 23). Judge McIntosh subsequently confirmed that discovery relating to the derivative

claim was limited to the question of whether she fairly and adequately represents the interests of the other members. *See* Order at 4–6 (Nov. 22, 2019) (R. 36–38).

On December 2, 2019, counsel for MPS and the majority shareholders notified Mattison's counsel of statements from *every member* of the firm except Mattison expressing opposition to the continued pursuit of the derivative action. *See* Email (Dec. 2, 2019) (R. 813–14); Email (Dec. 3, 2019) (R. 812). The Member Statements in Opposition indicated that each member of MPS had reviewed and considered Mattison's allegations in the derivative action; had determined the action was not in the best interests of the other members of MPS; and declined join, or in any way support, Mattison's derivative action. *See* Member Statements at ¶¶ 6–7, 9 (R. 816 to 836). In light of this evidence, and pursuant to Rule 11, SCRCP, counsel for MPS and the majority shareholders requested Mattison dismiss her derivative action. *See* Email (Dec. 2, 2019) (R. 813–14). Mattison declined to withdraw the derivative action and, instead, noticed the deposition of six of MPS's minority members. MPS and the majority shareholders moved for a Protective Order. *See* Mot. for Prot. Order (Dec. 11, 2019) (R. 738). After conducting a telephone hearing, the court orally ruled that Mattison would be permitted to depose three minority members of her choosing.

The depositions were held on January 17, January 29, and February 19, 2020. In the depositions, which on average lasted four hours each,[2] the minority members deposed by Mattison adopted and affirmed under oath their prior written statements in which they had declined to participate in the derivative action because they believed it was not aligned with their interests. *See* Joslin Dep. at 168:2 to 169:10 (R. 425:2 to 426:10); Jacobs Dep. at 164:2 to 165:21 (R. 448:2 to 449:21); Myers Dep. at 165:8–14 (R. 488:8–14). Further, when shown information by

[2] *See* Joslin Dep. at 1 (R. 409) (more than four hours); Jacobs Dep. at 1 (R. 431) (four hours); Myers Dep. at 1 (R. 455) (nearly four hours).

Mattison's counsel detailing the compensation of the majority members and the rent paid for MPS's building, the deposed members had no complaint or concern with the compensation or rent and, rather, believed they were appropriate amounts. Joslin Dep. at 80:6–18, 170:16 to 171:19 (R. 423:6–18, 427:16 to 428:19); Jacobs Dep. at 171:21 to 172:7 (R. 453:21 to 454:7); Myers Dep. at 167:1 to 168:5 (R. 490:1 to 491:5).

IV. MPS's Motion for Summary Judgment and subsequent, additional discovery.

Following these depositions, MPS and the majority shareholders moved for Summary Judgment on the derivative claim, arguing Mattison did not fairly and adequately represent the members because her claim would divest other members of their ownership; because the relief she sought would reverse years of business and operational decisions that all other members had voted unanimously to be in their interest; and because Mattison had brought the claim merely to gain leverage in her dispute with MPS regarding the value of her shares. *See* Motion (Feb. 21, 2020) (R. 748); Mem. in Supp. (May 6, 2020) (R. 751). Mattison filed a memorandum in opposition, and the Circuit Court held a hearing on the motion on May 12, 2020. *See* Mem. in Opp. (May 11, 2020) (R. 854); Hearing Transcript (May 12, 2020) (R. 308). At the hearing, Mattison's counsel confirmed three times that her motivation in bringing the derivative action was to gain leverage in her dispute with MPS regarding the valuation of her membership units, not for the benefit of the other members of MPS:

> THE COURT: . . . the clear uncontested issue between the parties in your correspondence to Sam is that, "We reject this offer that you have given us. And if you don't settle with us, we're going to file this derivative action." *It's clearly, based on your own language, a leverage being used in this case*, and I don't see how any time you can get around it . . . .
>
> MR. ROTHSTEIN: Well, Your Honor, I mean, *there was nothing improper in her doing that*.
>
> * * *

> THE COURT: . . . the real issue behind this derivative case, in my view, is that *she's trying to seek a higher payout*.
>
> MR. ROTHSTEIN: *No question about that*, Your Honor, but there's nothing wrong with that.
>
> * * *
>
> THE COURT: . . . your ultimate goal is to increase what her buyout is.
>
> MR. ROTHSTEIN: Absolutely. . . . I agree with that 100 percent that's the goal, but there's nothing wrong with that.
>
> * * *
>
> MR. ROTHSTEIN: . . . we're trying to maximize the value of ***her*** *claim*, that's absolutely what we're trying to do.

Hearing Tr. (May 12, 2020) at 9:8–18, 15:6–10, 17:10–17, and 20:23–24 (R. 316:8–18, 322:6–10, 324:10–17, and 327:23–24) (emphasis added).

The court held the Motion for Summary Judgment in abeyance pending Mattison's taking the depositions of three more minority members of her choosing. *See* Order (May 15, 2020) (R. 40). The final depositions were held on June 17, July 10, and July 20, 2020. As with Mattison's earlier depositions of minority members, these depositions were extensive, lasting an average of five-and-a-half hours each,[3] and all three deposed members adopted and affirmed under oath their prior written statements declining to participate in the derivative action, which they believed not to be in their interests. *See* Love Dep. at 231:18 to 232:25 and 237:6–9 (R. 547:18 to 548:25, 553:6–9); Pitts Dep. at 190:20 to 191:12 and 193:20–23 (R. 588:20 to 589:12, 591:20–23); Ballard Dep. at 195:20 to 196:14 and 202:2–5 (R. 643:20 to 644:14, 650:2–5). These deponents likewise had no complaint or concern about the compensation paid to the majority members after being

[3] *See* Love Dep. at 1 (R. 499) (six hours); Pitts Dep. at 1 (R. 555) (nearly five hours); Ballard Dep. at 1 (R. 592) (five-and-a-half hours).

shown information by Mattison's counsel detailing their compensation. *See* Love Dep. at 85:9–24 and 236:21–24 (R. 522:9–24, 552:21–24); Pitts Dep. at 75:3–19 (R. 568:3–19); Ballard Dep. at 35:14–21 and 72:15–25 (R. 604:14–21, 622:15–25). Indeed, they testified that the compensation paid to the majority members accurately "reflects the value that they bring to the firm compared to other members" and is consistent with the value they contribute to the firm. *See* Ballard Dep. at 199:1–10 (R. 647:1–10).

V. Summary judgment, Mattison's Motion to Reconsider, and the subsequent appeal.

Following the sixth deposition regarding Mattison's attempt to represent the other members, MPS and the majority members filed a supplemental memorandum in support of their still-pending Motion for Summary Judgment on the derivative claim. *See* MPS's Supp. Mem. (July 31, 2020) (R. 947). Mattison submitted a supplemental memorandum opposing the Motion. *See* Mattison's Supp. Mem. (July 31, 2020) (R. 958).

The trial court issued a Form Order granting MPS's Motion for Summary Judgment on the derivative claim, ruling Mattison did not fairly and adequately represent MPS's members because her interests diverged from theirs as evidenced by the fact that the relief she sought would divest other members of their ownership and was opposed by every other member of MPS. *See* Form 4 Order (Aug. 4, 2020) (R. 43). The Form Order awarded attorneys' fees in an amount to be determined to MPS and the majority members relating to the derivative action and indicated a written Order would be forthcoming. *Id*.

The parties subsequently filed memoranda in support of and in opposition to an award of fees. *See* MPS's Mem. in Supp. (Aug. 21, 2020) (R. 978); Mattison's Mem. in Opp. (Aug. 24, 2020) (R. 991). The trial court, treating Mattison's Opposition as a Motion for Reconsideration of

the attorneys' fee issue, issued an Order granting her Motion and vacating the prior award of attorneys' fees. *See* Order (Sept. 22, 2020) (R. 46).

The trial court subsequently issued a formal, written Order consistent with its prior Form 4 Order granting MPS's and the majority members' Motion for Summary Judgment on Mattison's derivative claim. *See* Order (Sept. 30, 2020) (R. 55). In it, the court concluded that Mattison was improperly using the derivative claim to increase the payout of her equity in MPS, and that Mattison's derivative claim diverged from the interest of the other members because the relief she sought would divest at least two other members of their ownership and every other member of MPS opposed the derivative action, whether brought by her or anyone else. *See id.*

Mattison filed a Motion to Alter or Amend rehashing the same arguments she had already raised to the court, and the parties filed memoranda in opposition and support of that motion. *See* Mattison's Mot. to Alter or Amend (Oct. 12, 2020) (R. 1008); MPS's Mem. in Opp. (Oct. 22, 2020) (R. 1013); Mattison's Mem. in Supp. (Oct. 23, 2020) (R. 1023). The trial court denied Mattison's motion. *See* Order (Nov. 9, 2020) (R. 72). Mattison filed her Notice of Appeal from the trial court's dismissal of her derivative claim on December 9, 2020.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP," and summary judgment "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citing Rule 56(c), SCRCP). The party seeking summary judgment has the initial burden of

demonstrating the absence of a genuine issue of material fact. *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Claims that rest on dispositive threshold issues may be decided on summary judgment. *See Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009) (affirming trial court's grant of summary judgment on the basis of the "threshold issue" of the applicability of the statute of repose); *Owens v. Magill*, 308 S.C. 556419 S.E.2d 786 (1992) (affirming trial court's grant of summary judgment dismissing putative class action based on the "threshold issue" of plaintiff's lack of standing and expressly noting the trial court did not err by refusing to permit discovery on the *merits* of the claim, which was irrelevant to the threshold question of plaintiff's standing to sue).

ARGUMENT

I. The trial court correctly ruled that Mattison did not (and could not) fairly and adequately represent the interests of MPS's other members.

Rule 23(b)(1) is clear: a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Judge McIntosh correctly determined that Mattison could not clear this threshold hurdle.

South Carolina's appellate courts have not previously articulated a precise test to determine a derivative plaintiff's adequacy as a representative of a corporation's other shareholders. The courts of other jurisdictions, however, have employed an eight-factor analysis, which Judge Mcintosh adopted in the instant proceeding, and which sets forth the following eight analytical factors:

(1) Economic antagonisms between the representative and members of the class;

(2) The remedy sought by the plaintiff in the derivative action;

(3) Indications that the named plaintiff is not the driving force behind the litigation;

(4) Plaintiff's unfamiliarity with the litigation;

(5) Other litigation pending between the plaintiff and defendants;

(6) The relative magnitude of plaintiff's personal interests as compared to his or her interests in the derivative action itself;

(7) Plaintiff's vindictiveness toward the defendants; and

(8) The degree of support plaintiff is receiving from the shareholders he or she purports to represent.

Order at 6–7 (Sept. 30, 2020) (R. 60–61) (citing *Davis v. Comed, Inc*., 619 F.2d 588, 593–94 (6th Cir. 1980); *Office of Strategic Services, Inc. v. Sadeghian*, 528 Fed. Appx. 336, 350 (4th Cir. 2013)). The eight factors overlap with one another, and any one of them can provide a sufficient basis to determine a particular shareholder does not fairly and adequately represent the interests of the other shareholders. *Davis*, 619 F.2d at 593 (noting that "the elements are intertwined or interrelated," and that while "it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1, . . . a strong showing of one way in which the plaintiff's interests are actually inimical to those he is supposed to represent fairly and adequately, will suffice in reaching such a conclusion."); *see also* Rule 23(b)(1), SCRCP, Rprtr's Note ("This Rule 23(b)(1) is the language of present Federal Rule 23.1.").

On appeal, Mattison has not challenged the trial court's articulation and adoption of this test, but, rather, merely disputes the trial court application of the test to the specific facts of this case and the conclusions the trial court reached. As explained more fully below, however, the trial court carefully and thoroughly considered the evidence relevant to the applicable factors and correctly concluded MPS had shown Mattison was not a fair and adequate representative of the other members' interests and, therefore, could not maintain the derivative action. The trial court's conclusions are supported by the Record.

A. Mattison conceded she brought the derivative claim for the improper purpose of gaining leverage in her dispute with MPS about the value of her shares.

The trial court correctly granted summary judgment on Mattison's derivative claim because

she admitted she had brought it for an improper purpose, namely to gain leverage in her dispute with MPS regarding the valuation of her membership units. *See* Order at 10–14 (R. 64–68). On appeal, Mattison suggests the trial court "misinterpreted or misconstrued" her repeated statements regarding the motivation behind her claim. *See* Mattison's Brief at 26–32. Her argument are without support.

The threat in Mattison's pre-suit letter, in which she sought *quadruple* the appraised value of her shares, was clear: either pay the inflated amount she sought or face a shareholder derivative action. *See* Letter from Rothstein to Keim at 3 (Jan. 14, 2019) (R. 845–47) ("If we are unable to resolve this matter . . . , Ms. Mattison intends to file not only an action for judicial valuation of her shares but also a shareholder derivative action . . . ."). Mattison confirmed this position in her repeated statements in open court:

> THE COURT: . . . the real issue behind this derivative case, in my view, is that she's trying to seek a higher payout.
>
> MR. ROTHSTEIN: No question about that, Your Honor, but there's nothing wrong with that.
>
> * * *
>
> THE COURT: . . . your ultimate goal is to increase what her buyout is.
>
> MR. ROTHSTEIN: Absolutely. . . . I agree with that 100 percent that's the goal, but there's nothing wrong with that.
>
> * * *
>
> MR. ROTHSTEIN: . . . we're trying to maximize the value of ***her*** *claim*, that's absolutely what we're trying to do.

Hearing Tr. (May 12, 2020) at 15:6–10, 17:10–17, and 20:23–24 (R. 322:6–10, 324:10–17, and 327:23–24).

On appeal, Mattison seeks to explain away these statements as a permissible attempt to restore the allegedly ill-gotten gains back into the coffers of MPS, which (she claims) will have

only the incidental effect of slightly increasing the value of her membership units. Her attempt to backtrack, however, is too little, too late, and is expressly contradicted by her explicit concession to the trial court:

> THE COURT: . . . the clear uncontested issue between the parties in your correspondence to Sam is that, "We reject this offer that you have given us. And if you don't settle with us, we're going to file this derivative action." *It's clearly, based on your own language, a leverage being used in this case*, and I don't see how any time you can get around it . . . .
>
> MR. ROTHSTEIN: Well, Your Honor, I mean, *there was nothing improper in her doing that*.

Id. at 9:8–18 (R. 316:8–18) (emphasis added).

The inescapable reality is that Mattison brought her derivative action in an attempt to gain a higher value for her equity shares in MPS. Despite her counsel's assertions that "there's nothing wrong with that," courts across the country have routinely dismissed derivative actions on the basis that the derivative plaintiff is using the lawsuit as a means of gaining leverage in other pending litigation. *See Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992) (holding plaintiff's vindictiveness toward the defendant and use of the derivative action as leverage in other litigation disqualified him from serving as a fair and adequate representative of the other shareholders); *Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) (holding plaintiff was not a proper derivative plaintiff because his interest in the derivative suit was "dwarfed by his interest in pursuing his litigation with the Bank"); *Recchion v. Kirby*, 637 F. Supp. 1309, 1315 (W.D. Pa. 1986) (finding that because the plaintiff had a pending wrongful discharge action against Westinghouse, and due to his small percentage of ownership of Westinghouse stock, it was obvious that he was pursuing the derivative action for his own interests, and not the interests of the other shareholders); *Palmer v. U.S. Sav. Bank of Am.*, 553 A.2d 781, 786 (N.H. 1989) ("A number of courts have held that plaintiffs who had large personal suits against the company which they

purported to represent were not adequate representatives because of the likelihood that they would use the derivative suit as leverage in settling the personal suit."); *Khanna v. McMinn*, No. Civ. A. 20545, 2006 WL 1388744 (Del. Ch. May 9, 2006) (finding the derivative plaintiff's employment dispute with the company impaired his capacity to vindicate the shareholders' best interests).

The Record demonstrates that Mattison asserted her derivative claim for an improper reasons, namely as leverage in pursuit of her own interests, and not to vindicate the interests of her purported class of members. Accordingly, the trial court correctly ruled that Mattison did not fairly and adequately represent the interests of the other members of MPS, and, therefore, pursuant to Rule 23(b)(1), SCRCP, granted MPS summary judgment on her derivative claim.

B. MPS's other members unanimously opposed Mattison's derivative action.

The trial court's Order granting summary judgment on Mattison's derivative claim noted another, independent reason she could not fairly and adequately represent the other members, namely because *every* member of MPS (other than Mattison) had declined to support or join her action and had affirmatively and had expressly stated she did *not* represent their interests. *See* Order at 7 (Sept. 30, 2020) (R. 61) (noting MPS and the Third-Party Defendants had produced declarations from every other member of the firm expressly declining to join or support the derivative claim and affirmatively stating Mattison did not represent the other members' interests); *id*. at 7–10 (R. 61–64) (relying on deposition testimony elicited by counsel for MPS and the Third-Party Defendants affirmatively and expressly indicating Mattison did not represent the interests of the other members); *id*. at 14–16 (R. 68–70) (pointing to specific, identifiable reasons why Mattison did not represent the other members' interests).

The trial court's extensive focus on this showing—which includes aspects of the first, second, and eighth *Davis* factors—reveals Mattison is wrong when she argues on appeal that the

trial court erred by "focus[ing] almost entirely on only one of the eight factors"—namely, her improper motivation—and by "not even address[ing] those other seven factors." Mattison's Brief at 22. Contrary to her argument, the trial court addressed each of the relevant factors, including the first (*see* Order at 15 ¶ 3 (R. 69)), second (*see id*. at 14–16 (R. 68–70)), fifth (*see id*. at 10–14 (R. 64–68)), sixth (*see id*. at 14 (R. 68)), and eighth (*see id*. at 7–10 (R. 61–64)).

The Record supports the trial court's conclusions. Every other member of the firm submitted written statements indicating they had reviewed and considered Mattison's allegations in the derivative action; had determined the action was not in the best interests of the other members of MPS; declined join, or in any way support, Mattison's derivative action; and opposed the continued pursuit of the derivative action. *See* Member Statements at ¶¶ 6–7, 9 (R. 816 to 36).

Mattison argues the trial court impermissibly relied on these "unsworn, boilerplate statements." *See* Mattison's Brief at 23–26. Mattison is incorrect, as a trial court may consider and rely on unsworn declarations or written statements at the summary judgment stage of a proceeding. *See*, *e.g*., *Byrd v. City of Hartsville*, 365 S.C. 650, 654 n.2, 620 S.E.2d 76, 78 n.2 (2005) (affirming trial court's grant of summary judgment relying in part on the unsworn statements). Further, the trial court did not rely exclusively (or even primarily or substantially) on the Member Statements. Rather, the court relied on the deposition testimony, Mattison's own statements and admissions, and other evidence.

Specifically, each of the six MPS members Mattison deposed adopted and affirmed under oath their prior written statements and expressly stated the derivative action was not aligned with their interests. *See* Joslin Dep. at 168:2 to 169:10 (R. 425:2 to 426:10); Jacobs Dep. at 164:2 to 165:21 (R. 448:2 to 449:21); Myers Dep. at 165:8–14 (R. 488:8–14); Love Dep. at 231:18 to 232:25 and 237:6–9 (R. 547:18 to 548:25, 553:6–9); Pitts Dep. at 190:20 to 191:12 and 193:20–

23 (R. 588:20 to 589:12, 591:20–23); Ballard Dep. at 195:20 to 196:14 and 202:2–5 (R. 643:20 to 644:14, 650:2–5).

The other members' opposition to Mattison's derivative claim was not, as she argues, due to their ignorance of the majority members' supposed wrongdoing. The signed Member Statements specifically note the members are aware of her allegations. *See* Member Statements at ¶ 6 (R. 816 to 836). In the depositions Mattison conducted, her counsel specifically presented the deponents with information detailing the supposedly excessive compensation paid to the majority members and the supposedly excessive rent paid for MPS's building. The deposed members reviewed the information and had no complaint or concern with that compensation or rent and, in contrast, believed they were appropriate amounts. *See* Joslin Dep. at 80:6–18, 170:16 to 171:19 (R. 423:6–18, 427:16 to 428:19); Jacobs Dep. at 171:21 to 172:7 (R. 453:21 to 454:7); Myers Dep. at 167:1 to 168:5 (R. 490:1 to 491:5); Love Dep. at 85:9–24 and 236:21–24 (R. R. 522:9–24, 552:21–24); Pitts Dep. at 75:3–19 (R. 568:3–19); Ballard Dep. at 35:14–21 and 72:15–25 (R. 604:14–21, 622:15–25). Indeed, they testified that the compensation paid to the majority members accurately "reflects the value that they bring to the firm compared to other members" and is consistent with the value they contribute to the firm. *See* Ballard Dep. at 199:1–10 (R. R. 647:1–10).

Further, the relief Mattison seeks in her derivative claim is contrary to the interests of the other members as it would effectively disenfranchise them by undoing agreements they voted unanimously (other than Mattison) to adopt and would oust other members from the firm by undoing the corporate transactions and agreements by which some of the current members *became* members. *See* Order at 14–15 (R. 68–69).

For example, Mattison's derivative claim asked the trial court to find that the addition of any new members without unanimous consent be declared null and void. *See* Am. Third-Party

Compl. ¶ 90 (R. 134). Mattison's derivative action thus seeks to divest two current members of their ownership interests—members she claims to represent and whose admission into membership in MPS was supported by every member *except for* Mattison. Further, her derivative claim seeks to undo votes and business decisions that every other member of MPS voted for and under which MPS has been operating for many years. She seeks a declaration, for example, that MPS's September 30, 2015 Operating Agreement is invalid because she did not sign the agreement. *Id*. at ¶¶ 48, 90 (R. 127, 134). Mattison was the ***only*** member of MPS who did not sign the Operating Agreement, and all other members of MPS have acted pursuant to the provisions of this Operating Agreement for years. Similarly, she asks the Court to declare invalid any proposed amendments to MPS's Operating Agreement which were not adopted by unanimous consent. *Id*. at ¶ 90 (R. 134). MPS recently adopted a Second Amended and Restated Operating Agreement dated September 16, 2019, which every member of MPS signed except for Mattison. Thus, Mattison is asking the Court to declare invalid an agreement that the members she purports to represented signed, consented to, and support.

The trial court correctly concluded Mattison's derivative claim was not and could not be representative of the interests of MPS's other members. Mattison's belated expression of willingness to sign whatever was needed to avoid those members being divested does not resolve her inadequacy. *See* Mattison's affidavit at ¶ 26 (R. 1096–97); Mattison's Brief at 31–32. Rather, it, *highlights* her inability fairly and adequately to represent the other members.

C. Mattison's remaining arguments as to the trial court's ruling on fair and adequate representation are unavailing.

Mattison's appellate brief raises nine issues and makes nine corresponding arguments. Most have been discussed and rebutted above. *See* Sections I(A)–(B), *supra*. The remainder, discussed briefly below, provide no basis to reverse the trial court's ruling.

1. The trial court properly understood the burden and applied it.

Mattison argues that the trial court erroneously placed the burden on her to prove her adequacy as a representative, rather than placing it on MPS to prove her inadequacy. *See* Mattison's Brief at 19–23. South Carolina's appellate courts have not yet addressed who bears the burden of proving (or disproving) that a derivative plaintiff does (or does not) satisfy Rule 23(b)(1)'s requirement. Other jurisdictions place the burden on the party disputing the adequacy of the representation. *See*, *e.g.*, 18 C.J.S. Corporations § 499 (noting in part that "a challenge to the adequacy of the stockholder's representative status places the burden on the party challenging the plaintiff's standing"). Assuming that South Carolina, like other jurisdictions, places the burden on the party challenging the adequacy of the representation, Judge McIntosh clearly understood and properly applied that burden. *See* Tr. at 11:9–11 (May 12, 2020) (R. 318) (Judge McIntosh: "The burden of proof is different. It's on the defendant as opposed to the plaintiff. I got that."); *id*. at 40:13–19 (R. 347) ("THE COURT: Okay. Mr. Rothstein, as to the representative issue, anything further? MR. ROTHSTEIN: Well, Your Honor, again, this is -- I know I put this in my brief, but they have the burden of proof. THE COURT: I think he's met that burden of proof quite frankly.").

The trial court's understanding and proper application of the burden is further evident from the analysis in the Order, which rested on MPS's and the majority members' affirmative showing of Mattison's inadequacy. *See* Order at 7 (R. 61) (noting MPS and the Third-Party Defendants had produced evidence affirmatively showing Mattison's inadequacy and inability to represent the other members); *id*. at 10–14 (R. 64–68) (agreeing with MPS's and the Third-Party Defendants' arguments that the record evidence affirmatively demonstrated an improper motive for Mattison's

derivative claim); *id*. at 14–16 (R. 68–70) (relying on specific, identifiable reasons brought forward by MPS why Mattison did not and could not represent the other members).

2. The trial court relied on admissible evidence.

Mattison argues on appeal that the trial court erred by relying on "confidential settlement information" found in that letter, namely the price MPS offered for her shares and the amount she demanded in return. *See* Mattison's Brief at 32–34. Her argument is contradicted by her past reliance on that letter. She incorporated it by reference in her pleadings, quoted it in her arguments to the trial court, attached it to a filing in the trial court, cited in her appellate brief, and included in her Designation of Matter. *See* Answer ¶ 105 (R. 101); Mattison's Mem. in Opp. to Mot. to Dismiss at 1–2, 8, and Ex. A (May 14, 2019); Mattison's Brief at 27; Mattison's Designation of Matter. Indeed, she expressly told the trial court the letter "was *not* written in the context of settlement negotiations." Mattison's Mem. at 2 (Sept. 8, 2019) (R. 680).

3. The trial court did not overlook any facts.

Mattison also argues that the trial court erred by supposedly ignoring the "facts" asserted in her affidavit and verified pleading. *See* Mattison's Brief at 34–35. The sole "fact" she identifies as having been overlooked, however, is not a fact at all, but is a legal conclusion, namely her assertion that "she can fairly and adequately represent the interests of similarly situated minority members." *Id*. at 35 (citing Mattison's Affidavit ¶ 23). However, a "conclusory statement on the issue in dispute does not create a question of fact precluding summary judgment." *Trotter v. First Fed. Sav. & Loan Ass'n*, 298 S.C. 85, 91 n.3, 378 S.E.2d 267, 269 n.3 (Ct. App. 1989). She identifies no other "overlooked" facts and, in any event, the other allegations in her verified pleading and affidavit are irrelevant to the issue that was actually before the trial court because they relate to *the* ***merits*** *of her derivative claim*, not her adequacy as a representative. The merits or demerits of her

claim were not before the court and were irrelevant until Mattison first cleared the threshold hurdle of proving her adequacy to bring the claim—a showing she failed to make.

4. Mattison's "class of one" argument is unpreserved and, in any event, is meritless.

Mattison argues the trial court erred by "refusing to consider the 'class of one' argument." Mattison's Brief at 36–40. She never raised that argument, however, until her Motion for Reconsideration. Accordingly, it is not preserved. Mattison claims she raised the argument at a hearing before the trial court. *See* Mattison's Brief at 39 (citing May 12, 2020 Hearing Tr. at 12:7–11). A review of the cited transcript, however, reveals the argument she made to the trial court was not the "class of one" argument she now asserts. Rather, that passage is merely a discussion of the dissimilarities between Mattison and MPS's other members; her counsel never suggested that those dissimilarities were a reason she could proceed as a one-woman "class."

Further, to the extent Mattison argued to the trial court that she was suited to represent the other members because, as a former employee, she was not under the thumb of MPS's management, the trial court considered and properly rejected her argument. *See*, *e.g.*, Order at 4, 9 (R. 58, 63) (rejecting Mattison's argument that the other members' resistance to her derivative suit was a result of coercion by MPS's management); *id*. at 15–16 (R. 69–70) (rejecting Mattison's argument that other minority members had an inherent bias and susceptibility to coercion in light of their current employment at MPS). Accordingly, the trial court did not, as Mattison now claims, "refus[e] to consider" her argument. *See* Mattison's Brief at 36.

5. The trial court properly limited discovery to the adequacy of Mattison's representation of the other members.

Mattison is further incorrect when she argues the trial court failed to permit adequate discovery. *See* Mattison's Brief at 40–43. At the time the trial court granted MPS's and the Third-

Party Defendants' Motion for Summary Judgment on Mattison's derivative claim, Mattison had taken six depositions of MPS members of her choosing, and MPS had produced over 9,500 pages of documents in response to her discovery requests in this suit. Indeed, the trial court had previously and repeatedly declined to consider the justiciability of the derivative claim until after allowing for more discovery. *See*, *e.g.*, Order (June 14, 2019) (R. 6) (allowing Mattison to conduct discovery on the question of whether she could fairly and adequately represent the other members); Order (July 2, 2019) (R. 10) (same); Form 4 Order (Oct. 10, 2019) (R. 20) (same); Order (Oct. 30, 2019) (R. 23) (same); Order (May 15, 2020) (R. 40) (same).

Further, Mattison is incorrect when she argues discovery was needed on the *merits* of her claim and the other members' knowledge of the alleged wrongdoing before the court could grant summary judgment on the threshold issue of whether she was an adequate representative of the other members. Courts have held that a plaintiff's adequacy to bring a shareholder derivative suit is a threshold issue to be decided *before* engaging in discovery and analysis of the substance of the claim. *See*, *e.g.*, *In re Facebook, Inc., Initial Pub. Offering Derivative Litig*., 797 F.3d 148, 157–58 (2d Cir. 2015) (affirming District Court's ruling that it should determine the "threshold matter" of the plaintiff's adequacy to bring a derivative action before grappling with the merits); *Barrett v. S. Conn. Gas Co*., 374 A.2d 1051, 1059 (Conn. 1977) ("We note further that the issue of whether Barrett could assure the court of adequate representation of Southern and its shareholders must necessarily be resolved before proceeding to the merits of the corporate claim in a derivative suit brought by him.").

South Carolina's courts regularly do what Judge McIntosh did here, by permitting only limited discovery on an initial, threshold question that must be addressed and decided before the substantive allegations and the merits of a claim or suit. *See*, *e.g.*, *Sullivan v. Hawker Beechcraft*

Corp., 397 S.C. 143, 151, 723 S.E.2d 835, 839–40 (Ct. App. 2012) (noting trial courts may permit discovery only on the threshold issue of personal jurisdiction over the defendant); *Owens v. Magill*, 308 S.C. 556, 563, 419 S.E.2d 786, 790–91 (1992) (affirming order granting summary judgment and finding no abuse of discretion in trial court's decision to limit discovery to threshold issue of standing). Judge McIntosh did not err by doing so here.

II. The trial court's Order should be affirmed because Mattison's Severance Agreement barred any suit against MPS.

The Order can be affirmed because Mattison released the derivative claim when she signed the Severance Agreement and General Release. The parties memorialized the terms of Mattison's cessation of employment with MPS in a Severance Agreement. Mattison admits that the Severance Agreement is a valid and enforceable contract. *See* Am. Answer, Counterclaims, and Third-Party Compl. ¶¶ 49, 61 (R. 128, 129). Paragraph 5 of the Severance Agreement provides as follows:

> **Covenant Not to Sue**. Employee hereby covenants and agrees not to file, commence or initiate any suit, grievance, demand or cause of action against the Released Parties based upon or relating to any of the claims released and forever discharged pursuant to this Agreement. If Employee breaches this covenant not to sue, she hereby agrees to pay all of the reasonable costs and attorney fees actually incurred by the Released Parties in defending against such breaching conduct, together with such other and further damages as may result, directly or indirectly, from that breach. . . . Employee expressly agrees not to commence or file any class action, including any class arbitration against Company, or serve in any representative capacity in any class action, including class arbitration, against or involving the Company.

Severance Agreement (December 5, 2017) at ¶ 5 (R. 151). The Severance Agreement further provides that the released claims—which, in paragraph 5 Mattison covenanted not to bring—include "any and all" causes of action arising from or in connection with the terms of her employment, her separation of employment, and "any conduct, actions, or omissions" by MPS, including all of MPS's officers and employees, occurring on or before December 5, 2018:

General Release of Claims. Employee hereby releases and forever discharges the Company, its subsidiaries, business units, affiliates, and parent companies, past and present, its predecessors and successors and its respective managers, officers, directors, employees, agents, legal counsel, and assigns, past and present (hereinafter referred to collectively as the "Released Parties") from *any and all known and unknown claims* of action that Employee may have against the Released Parties arising from or in connection with: (a) the terms and conditions of her employment with the Company; (b) the termination of her employment from the Company; and (c) *any conduct, actions or omissions, known or unknown, by the Released Parties* occurring on or before the date Employee executes this Agreement. This release, and the term "claim" or "claims" as used in this Agreement, include *all* benefits, grievances, proceedings, investigations, hearings, charges, complaints, claims, demands, actions, causes of action, and suits *of whatever nature*, whether known or unknown, fixed, absolute or contingent, matured or unmatured, asserted or unasserted, however arising, and whether legal, equitable or administrative. . . . It is expressly intended, understood, and agreed that the claims released by Employee shall include, by way of example and without limitation, all claims arising under federal, state or local statute, ordinance, common law, regulation, equity or other sources, whether known or unknown, based upon:

* * *

(f) Actual or alleged breach of express and implied contract, breach of contract accompanied by a fraudulent act, breach of implied covenant of good faith and fair dealing, interference with contract, promissory estoppel, and *claims under the Operating Agreement or any other operating agreement*, any employment agreement, handbook or policy relating to her employment or separation of employment;

* * *

Employee represents that she knows of no claim that she has that has not been released by this paragraph. This release does not extend to claims which is a matter of law cannot be waived. Employee acknowledges and understands that *this paragraph is intended to prevent her from making any claim against the Released Parties regarding any matter or incident relating to or arising from the Operating Agreement, other operating agreements*, the employment relationship or its termination that occurs up to the date Employee executes this Agreement; provided, however, that

> *nothing in this Agreement shall have any effect on Employee's rights and remedies relating to her dissociation from the Company*.

Id. at ¶ 4 (R. 149–51) (emphasis added and, as to the final paragraph, partially removed for ease of readability).

The sweeping breadth of the release is unmistakable. In it, Mattison released "any and all" claims relating to "any conduct, actions or omissions"; "all . . . complaints, claims, . . . and suits of whatever nature"; and "all claims . . . based upon . . . the Operating Agreement." *Id*. Lest there be any doubt, the release then reiterates that Mattison has released "*any* claim . . . regarding *any* matter or incident relating to or arising from the Operating Agreement." *Id*.

The sole carveout, found in the final sentence of the release, is for her rights and remedies related to the valuation of her shares (*i.e*., her dissociation from MPS). Her derivative claim, however, is unrelated to her dissociation from MPS and thus falls within the ambit of the release and covenant not to sue. Accordingly, the derivative claim asserted by Mattison violates the Severance Agreement's General Release of Claims and Covenant Not to Sue, and, therefore, was properly dismissed on MPS's Motion for Summary Judgment.

Mattison received valuable consideration in exchange for these covenants and releases, *see id*. at ¶ 2(a)–(h) (R. 147–48), and she admits in her Answer that the Severance Agreement "is a valid and enforceable contract." *See* Am. Answer, Counterclaims, and Third-Party Compl. ¶ 61 (R. 129). The Settlement Agreement was extensively negotiated by Mattison's counsel. Having bargained away any and all claims she might assert against MPS arising from any conduct, actions, or omissions by MPS's management, officers, or directors, Mattison cannot now maintain her derivative claim. The trial court could have granted summary judgment to MPS on Mattison's derivative claim on this basis, and this Court can and should affirm the lower court's ruling on this basis.

III. The trial court's Order should be affirmed because Mattison did not make an adequate pre-suit demand.

Finally, the Order can be affirmed because Mattison did not make an adequate pre-suit demand and could not, as a matter of law, make a pre-suit demand *after* asserting her claim. Derivative actions "have been characterized as a remedy of last resort because these actions impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 187, 539 S.E.2d 402, 408 (Ct. App. 2000) (citing *Renfro v. FDIC*, 773 F.2d 657, 658 (5th Cir. 1985)). "For this reason, the law imposes certain prerequisites on a stockholder's right to sue derivatively." *Id*. (citing *Kaplan v. Peat, Marwick, Mitchell & Co*., 540 A.2d 726, 730 (Del. 1988)). One of those prerequisites is the particularized pre-suit demand required by Rule 23(b)(1):

> Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRCP, in that it requires particularized allegations. Under Rule 23, "the shareholder must either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile, *i.e*., why the Board of Directors should not be allowed to decide whether to institute litigation."

Id. at 188, 539 S.E.2d at 409 (quoting *Allison ex rel. General Motors Corp. v. General Motors Corp*., 604 F. Supp. 1106, 1112 (D. Del. 1985)); *see also* Rule 23(b)(1), SCRCP ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . and the reasons for his failure to obtain the action or for not making the effort.").[4] A derivative action that does not meet the pleading requirements of Rule 23 cannot

[4] The Rule's reference to the efforts "if any" is in recognition of the fact that, as the final clause of the Rule's requirement notes, a demand may, in some instances, be futile. The Rule's text is clear and is confirmed by case law: a derivative plaintiff *must* either make a particularized demand or demonstrate why such a demand would have been futile. *See Carolina First Corp*., 343 S.C. at 188, 539 S.E.2d at 409 ("Under Rule 23, "the shareholder *must* either [1] make a demand or [2] plead with particularity the exceptional circumstances that demonstrate why a demand would be futile . . . ."") (emphasis added) (citation omitted).

be maintained. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). As explained below, Mattison did not satisfy this requirement.

A. Mattison did not made an adequate pre-suit demand.

Before filing a derivative suit, a plaintiff must make a genuine and detailed demand on the corporation's management in an effort to induce the desired changes. *Carolina First Corp*., 343 S.C. at 188, 539 S.E.2d at 409 (holding a shareholder "must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court"). "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id*. at 189, 539 S.E.2d at 409 (citations omitted). "Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations." *Id*. at 189, 539 S.E.2d at 409–10.

This Court's holding in *Carolina First Corp*. is illustrative. In *Carolina First Corp.*, a group of shareholders brought a derivative suit against a bank's parent corporation seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of the bank and its parent corporation. *Id*. at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants' motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirements of Rule 23(b)(1) and the demand was wrongfully refused. *Id*. at 183, 539 S.E.2d at 406. In their complaint, the shareholders alleged they demanded "certain information" and "certain actions" and made a "supplemental demand." *Id*. at 189, 539 S.E.2d at 409. Because the complaint did not contain allegations regarding precisely what the shareholders demanded and what the

bank's board of directors rejected, the court held the shareholders failed to comply with the demand requirements of Rule 23(b)(1) and affirmed the circuit court's dismissal of the action. *Id*.

Mattison's allegations are similarly deficient. Her Third-Party Complaint contains only one paragraph on the demand requirement, stating only that "[o]n January 14, 2019, Mattison's counsel sent a letter to Plaintiff's counsel suggesting that the firm should take action against its Managing Members for breach of fiduciary duty based on the acts of misconduct described herein." *See* Third-Party Compl. ¶ 105 (R. 101). This allegation does not state with sufficient particularity that a pre-suit demand was made on MPS's management. Counsel for Mattison "suggesting" to counsel for MPS that the firm should take action against its managing members for breach of fiduciary duty does not meet the heightened pleading requirements of Rule 23(b)(1). Mattison's allegation fails to demonstrate an earnest, and not a simulated, effort with the managing body of MPS to induce the remedial action she now seeks. *See Carolina First Corp*., 343 S.C. at 188–89, 539 S.E.2d at 409 ("[T]he sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it.") (citing *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 433 (Ct. App. 1997)).

The absence of particularized allegations in the Complaint is likely because the January 14, 2019 letter from Mattison's counsel does not contain the necessary level of detail and does not constitute a valid pre-suit demand. *See* Letter from Rothstein to Keim at 3 (Jan. 14, 2019) (R. 845–47). The letter was sent to MPS's counsel during negotiations regarding Mattison's dissociation from the firm. The letter threatened that if the parties were unable to resolve the valuation of Mattison's membership units, then Mattison would file a derivative action against the members of the management committee of MPS. Mattison never sent a demand directly to the management committee. *See id*. at 3 (R. 847). The letter did not, however, identify and describe with

particularity the alleged wrongdoers, the factual basis of the allegedly wrongful acts, the harm allegedly caused to the corporation, and what specific remedial relief was requested. *See id.*; *see also Carolina First Corp.*, 343 S.C. at 189, 539 S.E.2d at 409.

B. Mattison did not assert a valid reason for failing to make an adequate pre-suit demand.

As noted above, a plaintiff seeking to assert a derivative claim must "either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile." *Carolina First Corp. v. Whittle*, 343 S.C. at 188, 539 S.E.2d at 409 (citation omitted); *see also* Rule 23(b)(1), SCRCP. Mattison did not make such a demand, *see* Part III.A, *supra*, nor did she plead with particularity why her failure to do so should be excused because making the demand would be futile. Rather, her pleading merely states in conclusory fashion that "the managing members of MPS are not likely to authorize the commencement of legal action by Plaintiff against themselves individually." Third-Party Compl. ¶ 105 (R. 101).

This Court and courts across the country have uniformly rejected the argument that a demand would be futile merely because the majority of the board members are named as defendants and cannot be expected to sue themselves. *Carolina First Corp.*, 343 S.C. at 194–95, 539 S.E.2d at 412 (citing *Lewis v. Graves*, 701 F.2d 245, 248–49 (2d Cir. 1983); *Lewis v. Curtis*, 671 F.2d 779, 785 (3d Cir. 1982); *Heit v. Baird*, 567 F.2d 1157, 1162 (1st Cir. 1977); *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1580 (D. Kan. 1986); *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1114–15 (D. Del. 1985)). As the court in *Kaufman* stated, "[t]his argument lacks logic. If the Court were to accept it, derivative plaintiffs could readily circumvent [Rule 23's] demand requirements simply by naming all directors in the complaint." 634 F. Supp. at 1580.

In sum, Mattison did not made an adequate pre-suit demand or assert a valid reason for failing to do so. Accordingly, she failed to comply with the requirements of Rule 23(b)(1), SCRCP, and she could not, therefore, maintain her derivative action.

C. A derivative suit plaintiff cannot remedy the inadequacy of her pre-suit demand by making a more detailed demand after litigation is underway.

After conducting a hearing on MPS's Motion to Dismiss, Judge McIntosh declined to dismiss Mattison's counterclaims, but dismissed her derivative claim (without prejudice) and allowed her 30 days to amend her "pre-suit" demand and her derivative claim. *See* Form 4 Order (June 14, 2019) (R. 6); Order (July 2, 2019) (R. 10). Accordingly, nearly four months after the suit had commenced, Mattison's counsel sent new "pre-suit" demand letters (while the suit was pending) to MPS's majority shareholders and subsequently filed an Amended Answer, Counterclaims, and Third-Party Complaint that, again, asserted a derivative claim against the majority shareholders alleging breach of fiduciary duty and breach of the Operating Agreement. *See* Letters from Rothstein to Mssrs. Smith, Pazdan, Smith, and Cousins (June 18, 2019) (R. 160 to 167). Am. Answer, Counterclaims, and Third-Party Complaint (July 30, 2019) at ¶¶ 92–124 (R. 135–43).

A *post*-suit demand letter, however, cannot satisfy the requirement of Rule 23(b)(1), SCRCP. Allowing Mattison to make an entirely new demand upon MPS after having filed her derivative claim and to allege that the new demand is sufficient cuts against the logic underscoring Rule 23(b)(1). This rule is "not a technical procedural requirement," but reflects important policy concerns. *Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp*., 643 F. Supp. 310, 316 (D.S.C. 1986) (quoting *Smachlo v. Birkelo*, 576 F.Supp. 1439, 1443 (D. Del. 1983)). The requirement of a demand on directors and shareholders is designed, among other things, "to require resort to the body legally charged with conduct of the company's affairs *before* licensing suit in

the company's name by persons not so charged." *Id.* (citing *Heit v. Baird*, 567 F.2d 1157, 1162 n.6 (1st Cir. 1977)) (emphasis added). Indeed, "it serves the very important purpose of ensuring that *before* a shareholder derivative suit is brought, the company's board of directors has considered all possible intracorporate remedies." *Smachlo*, 576 F. Supp. at 1443 (citing *Heit*, 567 F.2d 1157) (emphasis added).

"[T]he failure to make a proper demand cannot be easily remedied by the Court granting the [party] leave to restart the process." *Smachlo*, 576 F. Supp. at 1443. "To hold that demands to satisfy Rule 23.1 may be made on the directors after a derivative suit has been initiated would be to reduce the demand requirement of the rule to a meaningless formality." *Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) (citing *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir. 1973)); *see id*. at 141–42 ("The contemplated showing of demand made upon the directors after the filing of the shareholders' derivative complaints could not have satisfied the demand requirements of the rule").

The procedural history in *Grossman v. Johnson*, 674 F.2d 115 (1st Cir. 1982) is analogous to the procedural history in the instant appeal, and it illustrates what should be the result here. In *Grossman*, the plaintiff brought a shareholder derivative action in District Court against an investment fund, its directors, and its advisor company. *Id*. at 117. Defendants moved to dismiss the complaint because the plaintiff had not complied with the demand requirement of federal Rule 23.1. *Id*. at 118. During arguments on the motion to dismiss, the District Court suggested it might be advisable, and might even end the controversy, "for plaintiff to send a demand letter to the directors specifying his position, although the litigation had already commenced." *Id.* "The District Court then stayed action on the motion and ordered the 'disinterested' directors to review the demand and report back to the court." *Id*. In the meantime, the plaintiff was allowed to file an

amended complaint. *Id*. at n.4. The directors ultimately declined to take the actions sought by the plaintiff and, instead, moved to dismiss the amended complaint, and, alternatively, moved for summary judgment on the basis of the failure to make a proper and timely demand. *Id.* The District Court entered summary judgment for the defendants. *Id.*

The First Circuit affirmed, holding that "[t]he purpose of the demand requirement is, of course, to require resort to the body legally charged with conduct of the company's affairs *before* licensing suit in the company's name by persons not so charged," and thus "the suit must be dismissed because plaintiff did not make the necessary demand *before* suing," *Id*. at 125–26 (citing *In re Kauffman*, 479 F.2d at 263; *Heit*, 567 F.2d at 1162 n.6.). The court expressly held that a plaintiff's failure to make an adequate pre-suit demand cannot be remedied by a post-suit demand:

> The final question is whether plaintiff's post-litigation demand cured his failure to make one before beginning the action. Rule 23.1 specifically calls upon the complaint to show that demand was made or was properly excused; there is no provision for thereafter remedying an omission in the same suit, especially after the defendants have moved to dismiss because of the absence of a demand.

Id. at 125; *see also In re Sapient Corp. Derivative Litigation*, 555 F. Supp. 2d 259 (D. Mass. 2008) (ruling the plaintiffs' post-suit demand did not meet the pleading requirements of Rule 23.1 and that "Plaintiffs cannot make the demand now to remedy their prior omission, especially because Defendants here seek dismissal based on Plaintiffs' failure to make a pre-suit demand").

The same result should apply here. South Carolina's Rule 23(b)(1), like federal Rule 23.1, makes no provision for a belated, post-litigation demand letter, which would defeat the important policy reasons underlying the requirement in the first place. The entire purpose of Rule 23(b)(1)'s demand requirement is to ensure that the board of directors or governing body of an organization is given the first opportunity to decide whether or not action should be taken against the company.

The management committee of MPS was not given an opportunity to remedy the alleged wrongs that Mattison complains of *before* the derivative action was filed. Accordingly, Mattison's post-litigation purported demand letters cannot satisfy Rule 23(b)(1)'s purpose. This Court can and should on this basis affirm the lower court's ruling granted MPS's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Respondents McMillan Pazdan Smith, LLC, Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins respectfully request this Court affirm the Orders of the Circuit Court granting summary judgment on Mattison's derivative claim and denying her Motion for Reconsideration of the same.

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June 16, 2021
Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2020-001645
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC,
Plaintiff/Counter-Defendant,.....Respondent,

v.

Donza H. Mattison,
Defendant/Counterclaimant,.....Appellant.

AND

Donza H. Mattison, in a Derivative Capacity
on Behalf of McMillan Pazdan Smith, LLC,
Third-Party Plaintiff,.....Appellant,

v.

Ronald G. Smith, Joseph M. Pazdan,
Brad B. Smith, and Chad C. Cousins,
Third-Party Defendants,.....Respondents.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Respondents McMillan Pazdan Smith, LLC, Ronald G. Smith, Joseph M. Pazdan, Brad B. Smith, and Chad C. Cousins complies with Rule 211(b), SCACR.

[*SIGNATURE PAGE ATTACHED*]

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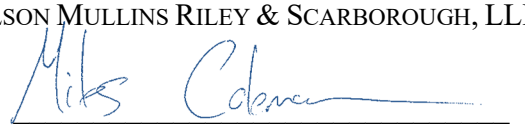
By: 

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